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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 153.

NORTON R. GANGER, L. C. BETHART,
THOMAS B. HAMILTON ET AL.,
Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

REPLY BRIEF OF APPELLANTS.

The appellee City takes two positions in its brief.

One is that no federal constitutional question was presented by the pleadings, decrees and opinions in the courts below.

The other is that even if such a question existed it was not timely raised.

1. The Existence of a Federal Constitutional Question.

The City asserts (B. 12):

> "Under Federal law the property owners have no right to notice in connection with such special assessments levied under the authority of the Legislature, although the Florida Statute prescribes that a notice shall be given by publication."

First. The assessments complained of were not levied under the authority of the Legislature. The assessments were levied under a resolution of the City Commission. The Commission acted pursuant to authority granted by its legislative Charter, but it is a far cry from this to say that the Legislature made a finding of benefits which was incontestable. Indeed, in the cases at bar there was no legally sufficient finding of benefits even under the Charter.

Here the legislative body, the City Commission, did not make the determination of benefits. That determination was made by the city manager. The assessment roll recites (R. 77):

> "I, the undersigned City Manager of Miami. Florida, do hereby certify * * * the total assessment chargeable against each lot or parcel computed according to frontage and is in proportion to special benefits and not in excess of such benefits;"

The City Manager simply assessed the cost on a front foot basis. The City in turn, without inquiry or determination of benefits, simply adopted a resolution confirming the actions of the City Manager and the Resolution contained no such determination (Appendix, Appellants' Brief 18). It was legally insufficient and, being unsupported, constituted a denial of procedural due process. *Gallegos* v. *Nebraska*, 342 U.S. 55; *Morgan* v. *U. S.*, 298 U.S. 468; *Fisher*

v. *Board of County Commissioners of Dade County,* Fla., 84 So.2d 572. In the last case, the court said that "in order to sustain the assessment, there must be some proof of the benefits other than the dictum of the governing body."

Moreover, the Circuit Court on testimony taken made a determination that benefit was lacking. This finding was not seriously questioned on appeal, and a specially concurring opinion of a Justice of the Florida Supreme Court stated that the finding was abundantly supported by the evidence (R. 37).

The cases cited by appellee, in support of their statement, do not sustain the position asserted. These cases are *Browning* v. *Hooper,* 269 U.S. 396; *Memphis & C. R. Co.* v. *Pace,* 282 U.S. 241; *Chesebro* v. *Los Angeles County Flood Control District,* 306 U.S. 459.

In each of the foregoing cases cited by the appellee the district was created by the legislature and a determination of benefits made by the legislature. There is, under the decisions of this Court and all of the authorities, a vast difference between the right to be notified and to be heard on the question of benefits where the improvement district is created by the legislature, as distinguished from such creation by a subordinate body to which the legislature has delegated authority to create a district.

Browning v. *Hooper* involved a road district created by the legislature (Text 404). The suit was brought to restrain the *sale of bonds,* the proceeds of which were to be used by a road district. The statute authorizing the issuance of the bonds also required the affirmative vote of two-thirds of the property owners in the district before the bonds could be issued and sold. In this case the Court also, in the very next sentence following the appellee's quotation, said:

> "But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the Legislature, and there has been no legislative determination that their property will be benefited by the local improvement. * * *"

Memphis & C. Ry. Co. v. *Pace et al.*, the legislature after creation of the improvement district by an inferior body, passed legislative acts confirming the districts (Text 243). That district likewise involved a bond issue consequent upon an election resulting in a vote in favor of the issue. This Court, even under these circumstances, said:

> "But, however, the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, Houck v. Little River District, supra; and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. Gast Realty Co. v. Schneider Granite Co., 240 U.S. 55, 36 S.Ct. 254, 60 L.Ed. 523; Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U.S. 658, 41 S.Ct. 440, 67 L.Ed. 758; Road Improvement District No. 1 v. Missouri Pacific R. R. Co., 274 U.S. 188, 47 S.Ct. 563, 71 L. Ed. 922."

In the case at bar the record reveals a finding of no benefits. Also shown is the fact that similar work was done upon extensions of some of the streets which are involved here, and that the cost of the work was paid for by the City out of general funds (R. 58). It is difficult to imagine a case of grosser discrimination.

Chesebro v. *Los Angeles County Flood Control District* also involved a district created by legislative act. In addition, the appellant conceded that his lands were specially benefited. However, the case does enunciate a principle favorable to the appellants, viz.: that an appeal

should not be dismissed for want of jurisdiction if the issue of jurisdiction is "fairly debatable." This Court said:

> "Petitioners appealed to this court; appellees moved, as to the city, to dismiss or affirm on the ground that no federal question was involved; and, as to both appellants, on the grounds that no substantial federal question was presented, and that the decision below rests upon adequate non-federal grounds. We dismissed the city's appeal for want of a substantial federal question and postponed to the hearing on the merits further consideration of the question of jurisdiction and of the motion to dismiss or affirm. City of Los Angeles v. Los Angeles County Flood Control Dist., 305 U.S. 564, 59 S.Ct. 104, 83 L.Ed. .....
>
> That motion is denied. The validity of the statute under the federal constitution was by the petition appropriately drawn in question and in substance the decision of the state supreme court is in favor of its validity. See People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67-69, S.Ct. 61, 63, 73 L.Ed. 184, 62 A.L.R. 785. Its judgment does not depend upon characterization of the statute or mere interpretation of the language employed. Its decision is to the effect that the legislature found that the real property within the flood control district would be specially benefited by the acquisition of the district drainage works and that therefore the appellant and other owners are not entitled to be heard on the question of benefits. * * * We are unable to say that the question is foreclosed by our decisions or that it is so clearly not debatable as to require dismissal for lack of substances. Hamilton v. Regents, 293 U.S. 245, 258, 55 S.Ct. 197, 202, 79 L.Ed. 343; Alton Railroad Co. v. Illinois Commerce Commission, 305 U.S. 548, 59 S.Ct. 430, 83 L.Ed. 344, decided January 16, 1939. * * *"

The difference between an assessment district created directly by the legislature and one created by a subordinate

body to which discretionary authority was delegated by the Legislature is well stated in *48 Am. Jur.* (Special Assessments) 695, Section 156. Citing numerous decisions of this Court, it is there said:

> "Contrary to the view stated in the preceding paragraph, it has been ruled that where the legislature of a state does not itself act in determining an improvement district or area or in making a special or local assessment, but delegates the power to do the same to some subordinate body, due process of law requires that at some stage of the proceedings before the assessment becomes irrevocably fixed, the property owner shall have an opportunity to be heard, of which he must have notice either personal, by publication, or by a law fixing the time and place of hearing. The proceedings in such instance are in their nature judicial in the sense that such right to notice and hearing exists."

This distinction has long been recognized in Florida.

In *Lainhart v. Catts*, (1917) 73 Fla. 735, 75 So. 47, where the legislature had created a drainage district and imposed assessments without notice, the Supreme Court of Florida said:

> "There is a wide difference between a special tax or assessment for local improvements prescribed by the legislative body, having full authority over the subject, and one dependent upon the judgment and actions of bodies or instrumentalities acting under delegated powers."

See also: *Redman* v. *Kyle*, 76 Fla. 79, 80 So. 300.

Squarely in point, even to involving resurfacing as against original paving is *Sears et al.* v. *Mayor, etc., of Atlantic City et al.*, 73 N.J.L. 710, 64 Atl. 1062.

Secondly. The exact contrary to appellee's position was held by the Florida Supreme Court in this case. In discussing the necessity for and the sufficiency of the notice, the Court said in its first majority opinion (R. 33):

> "So to generate the power vested by the statute, the resolution must be adopted, and to secure *due process** to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given."

Even in the absence of this statement, it is obvious that the whole case revolved around this point. Until present counsel came into the case—which was not until after an appeal was taken to this Court—no argument to the contrary has ever been suggested.

Indeed the City's only real defense to the suit was that the property owners were estopped to contest the determination of benefits because they failed to appear in response to the notice by publication and to avail themselves of the administrative procedures which were thereupon made available. The City's main argument has always been that since the notice was valid the assessments were incontestable.

How could such a notice be invalid other than under the due process clause? It was never contended by the appellants that the notice was merely formally deficient. They contended that the notice was substantially deficient, a contention with which the trial court agreed when it found that the notice was "insufficient as a matter of law" for the reason, among others, that it was inserted in the Miami Herald in such a manner "that it cannot be said that any reasonable person was put upon notice by it that their

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*Emphasis herein supplied unless otherwise noted.

property was going to be subjected to a special assessment" (R. 23). This language echoes the thought, if not the words of Mr. Justice Jackson in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, and almost paraphrases the language of the Florida Supreme Court itself in a similar case involving a similar charter (*Rafkin* v. *City of Miami Beach*, 38 So. 2d 846), wherein the Court said that the notice in the newspaper was so intermingled "with other printed matter that one of ordinary mind would not be put on notice that his rights were in danger."

In *Mullane's* case, the Court said that "it would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the Courts."

Further in *Mullane's* case, the Court said:

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted on the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint."

Accordingly, the Court reversed the judgment because the requirement of the New York statute was "incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights."

Conclusive evidence that a federal constitutional question was raised is found in the complaint (R. 6, 7), which contained this allegation:

> "The special assessments sought to be imposed upon the abutting property owners in Highway Improvement District H-477 are illegal and void and constitute taking of property in violation of the Constitution of the United States and of the State of Florida, upon the following grounds:
>
> > 'The Notice was published in an inconspicuous place upon the Classified advertising section of the Miami Herald, a position in which it was least likely to attract the attention of persons such as the Plaintiffs and those on whose behalf this suit is brought.' "

Appellee chides us because the Constitution of the United States is mentioned only once in the complaint. The invocation of constitutional guarantees is not generally regarded as a form of incantation whose effectiveness increases with repetition. If the Constitution were a remote diety, intercession might require frequent supplicatory attitudes. Instead the Constitution is the law of the land, and its due process clause is an effective defense to all who resort to its protection against arbitrary state action. Due process of law is generally regarded as being the equivalent of the provision of Magna Carta regarding judgment *"per legem terrae,"* and as such was properly and timely used as a shield against unlawful municipal action here sought to be curbed. In the face of the elaborate briefs which were filed in the court below, it would be idle to pretend that the Florida Supreme Court was not aware that an attack was being made on the proceedings because they violated the due process clause of the Four-

teenth Amendment.[1] Such a contention also would do no credit to the learning and ability of the Justices of that august tribunal. The fact is that the Florida Supreme Court, necessarily by its actions, held that notice by publication to resident property owners on special assessment proceedings was sufficient as a matter of law. Such a holding is contrary to this Court's opinion and cannot therefore be sustained.

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1. In the property owners' first brief filed in the Supreme Court on September 13, 1955, we said (B. 18):

> "The City impliedly admits—as indeed it must—that in the imposition of special assessment liens, some form of notice to affected property owners is essential under the due process clause. It asserts, however, that the sufficiency of the notice in this case has been previously adjudicated by this Court, which, so it is said, ruled in a similar case that an identical notice was sufficient. The case so relied upon is *Escott* v. *City of Miami*, 107 Fla. 273, 144 So. 397.
>
> * * *
>
> In the *Escott case*, the Court indicated that such proceedings are judicial in nature; and that the property owner must have notice at some time before the final assessment is made in order to meet substantial requirements of due process of law.
>
> But the insufficiencies of the notice, which are hereafter pointed out, were not discussed in the Escott case and we do not believe the Court meant to pass upon them. The authorities—including those cited in the opinion itself—all hold that the notice is lacking in the essential requirements of law. It would be unfair to attribute to this Court an intention to run counter to these authorities."

In a brief filed on the occasion of the reargument on the City's petition for rehearing and prior to the last majority opinion, we said (B. 52):

> "The notice was insufficient and deceptively published. It was a form of process. Being so, it was subject to constitutional requirements of due process. Due process forbids constructive service on known residents. The assessment rolls disclose the names and addresses of each property owner. If tax bills could be sent by mail the notice of the City's intention to make the levy could also have been sent by this method."

Even if the Constitutional question were not explicit in the Court's opinion, the cases are legion which hold that a special assessment must be supported by special benefits and that in order for the assessment to be valid, the owner of the property assessed must have notice of the hearing on the determination of benefits and an opportunity to be heard.

McQuillin, Mun. Corp., Third Ed., Sec. 38.98.

Fallbrook Irrigation District v. *Bradley*, 164 U.S. 112.

Turpin v. *Simon*, 187 U.S. 51.

Londoner v. *City and County of Denver*, 210 U.S. 373.

Bellingham Bay & B. C. R. Co. v. *City of New Whatcom*, 172 U.S. 314.

Town of Monticello v. *Finlayson*, 154 Fla. 274, 17 So.2d 84.

City of Hollywood v. *Davis*, 154 Fla. 785, 19 So.2d 119.

Cited to the text in McQuillin are cases in 26 state jurisdictions.

In *Sears* v. *Mayor, etc., of Atlantic City*, 73 N.J.L. 710, 64 Atl. 1062, the Court, in a thoughtful and carefully worded opinion, discussed this question of benefits and notice and lucidly explained the reason for the conclusion that notice was essential to validity. The Supreme Court had held:

> "* * * that the ordinance was invalid, because it was passed without notice to those property owners who were affected by the provision which directed an assessment for benefits to be made. * * *"

The Court of Error and Appeals differentiated between the legislative act of a municipality in repairing streets in the performance of a municipal duty and the act of paving a street, not as a matter of ordinary repair, but upon specified conditions and when the burden was to have been

placed, not upon the public treasury but upon a specific class of individuals. The Court said that the soundness of the lower Court decision depended upon whether the ordinance providing for the improvement and assessment was judicial or legislative in character. The Court, quoting from an earlier case, said that this latter class of cases were judicial in their nature, adding:

> "'* * * With respect to this latter class the adoption of an ordinance directing the improvement to be made, is a judicial act affecting those individuals, and they are entitled to be heard before the ordinance is passed which adjudges the necessity or expediency of the proposed improvement, and directs it to be made.'"

In holding the Atlantic City ordinance which created the improvement district and decreed assessments to be made against the abutting property to be invalid, the Court concluded as follows:

> "* * * The question whether the benefit received was less than the burden imposed never has been considered as having any bearing in determining whether the ordinance which required the making of the improvement was legislative, or judicial, in its character. On the contrary, the fact that it imposes a burden upon the abutting land has been the only test, without regard to whether the benefit conferred was, or was not, an equivalent for the burden imposed. The test furnished by the rule must be accepted as an inherent part of the rule itself. Its application renders the ordinance under consideration invalid.
>
> The judgment of the Supreme Court must be affirmed."

In *Electric Short Line Term. Co.* v. *City of Minneapolis*, (Minn.) 64 N.W.2d 149, the Court passed upon a situation closely analogous to that presented here. The facts in the cited case are relatively simple. The Electric Short Line

Term. Co. owned property which abutted upon 7th Street and 3rd Avenue. These streets intersected each other at right angles at plaintiff's property. The City adopted a resolution which changed the grade of that portion of 7th Street which constituted the approach to the 7th Street bridge. The property owners sued the City for damages caused by raising the grade of the street and eliminating the intersection. The City asserted as a defense that the plaintiff had failed to resort to the sole and exclusive remedy which was provided for by the City Charter and were therefore barred. This administrative remedy, among other requirements, contained one which based a right to compensation in those who had filed notices within a 20-day period fixed by the Charter. The lower Court struck the part of the answer asserting such defense, and the City appealed.

The Supreme Court affirmed, saying:

> "Does the remedy provided by c. 8, § 2, contain the essential element of *adequate* notice to the abutting property owners? If adequate notice is to be found therein it must be on the theory that a legislative act which directly exercises the power of eminent domain by appropriating private property to a future public use, is a public act of which, like other legislative enactments of general application, every citizen is presumed to have knowledge and therefore notice. This theory was adopted in the majority opinion of State v. Messenger, supra, and was confirmed in State v. Bruggerman, 31 Minn. 493, 18 N.W. 454. In the Messenger case, which upheld a special legislative enactment appropriating private property to a public use and subjecting the owner to a forfeiture of his constitutional right to compensation unless a claim for damages was made within 60 days of the passage of the act, Mr. Chief Justice Gilfillan dissented, pointing out that it is fallacious to hold that the presumption that

everybody knows the law supplies adequate constructive notice since the property owner would reasonably learn of the enactment only by sheer chance. The presumption that every citizen knows the law is nothing more than a restatement of the principle that ignorance of law is no excuse for noncompliance. Clearly such presumption is an illusory substitute for the notice required in eminent domain proceedings to apprise an owner of the invisible appropriation of his property to a future public use so that he may fairly be forewarned that he will lose his constitutional right to compensation if he fails to act within a prescribed period.

The unsoundness of this theory becomes strikingly apparent as it is exemplified in the instant case. Chapter 8, § 2, by explicit language purports to terminate completely an abutting owner's right to compensation unless such owner within 20 days after the city council *has voted* (not 20 days after the first publication of the resolution) to change the street grade actually files a notice of claim with the city clerk. A city council vote can only be effective as notice to the average property owner on the unrealistic assumption that by some process of intuition he is promptly informed when the council takes action which affects his particular property. As a prerequisite to the commencement of the 20-day limitation period, c. 8, § 2, contains no provision whatever for constructive notice to the property owner by publication or by the posting of any appropriate notice. All provisions therein for constructive notice by publication relate to hearings held subsequent to the expiration of the time for filing claims.

* * *

In recognizing that the mere enactment of a statute appropriating private property is not of itself such constructive notice as will start the running of a statute of limitations period during which the property owner must assert his right to compensation, Mr. Justice Cardozo said:

"* * * Before the citizen's right to compensation can be cut off by such a statute of limitation, notice of the event on which the right depends must be brought home to him by the state. He cannot be charged with the duty of hunting out the facts for himself. The state is appropriating his property by proceedings *in invitum*, and it cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adapted to bring their pendency to his attention.' Matter of City of N. Y. (Grand Boulevard), 212 N.Y. 538, 544, 106 N.E. 631, 632.'"

2. The Timely Raising of the Federal Constitutional Question.

The argument under this question unavoidably spilled over into the first, but we shall try to avoid repetition. The contention that the basic question was not raised is almost an affront to all of those (the Chancellor, the Justices and counsel on both sides) who have been participating in these cases for nearly six years. To be told now that the main question was never raised, argued or decided leaves us astonished and dismayed.

The fact is that in the City's assignments of error (3, 4 and 5) in the Florida Supreme Court, it was asserted that (R. 26):

"3. The Chancellor erred in finding that the *Notice* of Hearing of Objections to the Confirmation of the Resolution ordering Highway Improvement District H-477 was *insufficient as a matter of law.*

4. The Chancellor erred in finding that the Notice was insufficient because it was inserted in the classified section of the 'Miami Herald'.

5. The Chancellor erred in finding that any reasonable person was not put upon notice that their property was to be specially assessed."

The Florida Supreme Court agreed with this and held in its majority opinion that (R. 35):

> "On the matter of the validity of the notice we must disagree with the chancellor, and by disagreeing, we cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the city, *on the ground that due process had not been afforded them.*"

Here is a definite, pin-pointed recognition of the property owners' complaint and the extent of the trial court's finding. Its specificity should satisfy the most captious.

This statement should be a sufficient answer to appellee's brief (4) that on the "first majority opinion written by the Florida Supreme Court (R. 32-41) there was no discussion of any constitutional question either State or Federal."

As to the appellee's further statement that the second majority opinion did not discuss any constitutional question whatsoever, its counsel has evidently overlooked the quotation (R. 51) that:

> "If the property owner had notice, and in this case we have held that he did have, his only method of questioning any error or irregularity in the proceedings was by filing objections before the city commission, and, if overruled there, by filing his special appeal to the circuit court in the manner provided by the charter."

What the City is apparently unable to accomplish is to equate the necessity for notice with the requirements of due process of law. We thought that Webster had long ago settled that difficulty with his famous aphorism that linked "hearing" inseparably with "determination." But who can be heard without notice?

Yet even if we accepted appellee's view that this basic constitutional question was not raised in the complaint, in the decree and in the opinions, there is no doubt that in the appellants' petition for rehearing they made it abundantly clear that the opinion had transcended constitutional limits and transgressed opinions of this court. This petition asserted (R. 65):

> "4. In holding the notice of the confirmation of assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV, U.S. Const., must be complied with. In the case of residents, constructive notice, as attempted is violative of the rights secured by such amendment."
>
> *Walker* v. *City of Hutchinson*, 352 U.S. 112.
>
> *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306.

That the Court was impressed is evident by the order which allowed a brief to be filed confined to the questions so raised.

Also significant is the vote that followed. When the court first heard the case, the majority spoke through Thomas, J., with Terrell, C.J., and Roberts and Thornal, J.J., concurring. Drew, O'Connell and Hobson, JJ., dissented. On the City's petition for rehearing, Drew, O'Connell, Hobson and Thornal voted to grant. They later reversed the decree previously affirmed. Terrell, C.J., Thomas and Roberts, JJ., dissented. When the property owners petitioned for rehearing, Thomas and Roberts, J.J., stood firm. Terrell, C.J., voted to deny, *but* Hobson, J., voted with Thomas and Roberts, J.J., to grant (R. 71). In

the long course of these proceedings, the Chief Justice and Justices Thomas, Hobson, Roberts and Thornal have, at one time or another, agreed with appellants' contention. Three opinions were written on the first hearing and two on the rehearing. That so much effort and such contrariety of opinion was about so little belies the City's contention.

So, even if appellee were correct (which it is not) in its contention that the federal constitutional question was not raised until the property owners petitioned for rehearing, still the question was raised then, and case after case holds that this is time enough.

Saunders v. *Shaw*, 244 U.S. 317.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673.

State of Missouri ex rel. Missouri Ins. Co. v. *Gehner, Assessor*, 281 U.S. 313.

Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 156.

Especially is the fact that the timely raising of the federal constitutional question not open to argument here when there is considered the fact that the Court permitted the property owners to file a brief on the petition for rehearing confined solely to the federal constitutional question presented by the petition for rehearing (R. 70).

Florida Appellate Rule 3.14 does not provide for the filing of briefs on such petition and indeed prohibits the making of argument in the petition. Hence the necessity for obtaining leave so to do (R. 69).

This should sufficiently answer both of appellee's contentions. For the sake of completeness, however, there are a few statements in appellee's brief which require a direct response.

Appellee says (B. 4):

> "Upon the appeal to the Supreme Court of Florida, and under the first majority opinion written by it (R. 31-41), there was no discussion of any constitutional question either State or Federal. *This opinion held in substance that the notice was valid* and substantially conformed to the statute (R. 35), that *the court could not agree with the trial court, that there was no benefit to the property owners* (R. 35), but that the City had no authority to levy the assessments under its Charter (R. 36), and therefore, the judgment of the lower court would be affirmed."

The above statement is inconsistent with the basic position taken by the City to the effect that the Supreme Court did not pass upon the question of notice.

The second emphasized portion of the above statement is not in harmony with the record. The Court, in the first opinion, said (R. 35):

> "We can understand the potency of an argument that once a street is paved the cost of maintaining it should be borne by the public. Although we cannot agree that keeping a street in good repair is of *no special benefit whatever* to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found in the charter, and in our search we have not discovered that the municipality was granted the power to 'resurface' and assess the costs as in the case of original or new construction."

The concluding sentence in the paragraph from which the above quotation is taken is as follows (R. 36):

> "The total application consisted of a coating an inch and a half in thickness, and when this work is considered with the nature of a street, it seems to us that the circuit judge was not illogical in his holding

that the layers were to make smoother a street worn by traffic, and that the improvement was in effect maintenance as distinguished from construction or *re*-construction." (emphasis not supplied).

Having determined that the work which the City did was *resurfacing* as opposed to *reconstruction*, the first majority opinion then concluded that the City lacked authority to assess for resurfacing.

But as we have said above, one of the justices (Thornal) filed a specially concurring opinion (R. 37), in which he said that the record abounded in evidence more than adequate to sustain the trial judges' finding that the work was for the benefit of the general public. Certainly the watered-down statement that the Court understood the potency of the argument and the conclusion that the Circuit Judge was not illogical in his holding is a long way from overturning the direct finding by the Circuit Court that the work conferred a special benefit upon the abutting property. What the Court in effect was saying was that the property owners' argument, that under no circumstances could resurfacing be a special benefit, was impressive but not convincing.

Appellee then makes reference to the property owners' petition for rehearing, saying:

> "* * * The said paragraph 2 stated that lack of notice of the confirmation of the assessment roll was violative of procedural due process and the appellants should not be estopped. This paragraph totally disregards the facts found by the majority final opinion of the Appellate Court on estoppel showing the suit was filed more than a year after the assessments and showing other notices as to the improvements and as to confirmation of the roll without any objections filed (R. 50-51 note at bottom of pages)."

The statement that the suit was filed more than a year after the assessments were made is not true. The City's answer alleged (R. 13):

> "* * * Defendant further alleges that plaintiffs and each of them and each of those persons whom they purport to represent failed to file *within ten days from the confirmation of the assessment roll* fixing assessments complained of in the Amended Bill of Complaint, their written verified petition in the office of the Clerk of the Circuit Court in and for Dade County, Florida, in conformity with Section 56(n) of the said City Charter, * * *"

The Hamilton suit was filed within 48 days after the assessments were confirmed, and the Ganger suit was filed within 57 days after the confirmation.

The confirming Resolution in the Hamilton case (H-477) was adopted on March 18, 1953 (Appendix to Appellants' Brief 18, 19). The complaint was filed on May 5, 1953. The City filed a motion to dismiss, which was denied, and an appeal was taken to the Supreme Court of Florida where the order was confirmed on October 6, 1953. *City of Miami* v. *Hamilton*, Fla., 67 So.2d 430.

In the Ganger case (District H-503), the assessments were confirmed on February 18, 1954 (Appendix to Appellants' Brief 13), and the suit was filed April 1, 1954.

Appellee has evidently confused the filing of the Ganger suit with the confirmation of the assessment liens in the Hamilton case, an oversight which we are sure was unintentional.

The broad statement is made (B. 10) that the Appellants in their brief have not seen fit to cite any cases involving special levies for local improvements or involving taxation in any of its phases.

This statement is likewise incorrect. *New York* v. *N. Y., N. H. & H. RR. Co.*, 344 U.S. 293, involved a special assessment levied by the City of New York against the property of the railroad company. The bankruptcy court barred the city's claim against the enforcement of the assessment lien because it failed to respond to a publication of a notice in local newspapers. The Court held that service by publication against a local municipality was a denial of due process of law.

The case of *Wisconsin Electric Power Company* v. *City of Milwaukee*, 352 U.S. 948, is directly in point. In this case, the Power Company sued to enjoin the enforcement of special assessment liens which was exactly what was done in the case at bar. The gravamen of the complaint was that notice of the confirmation of the assessment was only such by publication, hence the liens were void. The Supreme Court of Wisconsin affirmed an order sustaining a demurrer to the complaint. The headnote of that Court is as follows (*Wisconsin Electric Power Co.* v. *City of Milwaukee*, 263 Wis. 111, 56 N.W.2d 784):

> "In action to set aside special assessments levied by defendant city against right-of-way properties of plaintiff electric power company, order sustaining demurrer to complaint on ground that notices of hearing, given by publication only, as required by city charter, were adequate to comply with due process requirements, was affirmed by equally divided court."

The Power Company filed an amended complaint in the Circuit Court. This was dismissed. A second appeal was taken. Again the Court affirmed saying (*Wisconsin Electric Power Co.* v. *City of Milwaukee*, 272 Wis. 575, 76 N.W.2d 341):

> "The amended complaint does not differ in any material respect from the original complaint, nor does

appellant contend that it does. It presents to us the identical issue which we considered and determined in Wisconsin Electric Power Co. v. Milwaukee, 1953, 263 Wis. 111, 56 N.W.2d 784. The reason for this appeal appears to be that since the first one the Supreme Court of the United States has considered once more the sufficiency of notice given by publication and in City of New York v. New York, N. H. and H. Ry. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333, has affirmed and somewhat strengthened the principle it announced in Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (referred to in our former opinion, 263 Wis. 111, 112, 56 N.W.2d 784), namely, that when more certain means of communication are reasonably available, notice by publication is insufficient to meet the demands of due process of law. In effect, appellant does no more than to ask us to reconsider, in the light of this more recent authority, our previous decision that the notice of special assessments given by the city by publication did not offend constitutional requirements."

This time the Power Company appealed to this Court which noted probable jurisdiction and remanded the cause for further consideration in the light of the decision in *Walker* v. *City of Hutchinson*, 352 U.S. 112. This time the Wisconsin Court reversed the Circuit Court decree saying (*Wisconsin Electric Power Company* v. *City of Milwaukee*, 275 Wis. 121, 81 N.W.2d 298):

"In view of the determination made by the United States supreme court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process. Mullane v. Central Hanover B. & T. Co., 1950, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and Walker v. City of Hutchinson, 1956, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 2d 178. Therefore, it was error for the trial court to

have sustained the general demurrer interposed to plaintiff's amended complaint."

No case could possibly be found which is closer in point than this.

Yet, strong as this authority is, the cases at bar present a situation which cries out even more loudly for attention. We ask the Court to consider these factors:

1. The Complaint alleged that the notice by publication was given and that the property owners did not appear in response to it and file objections to the assessments.

2. The Circuit Court of Dade County held that the complaint stated a cause of action.

3. The Supreme Court of Florida (*City of Miami* v. *Hamilton*, Fla., 73 So.2d 715) affirmed the lower court.

4. By this act the law of the case was established. In Florida (as well as in Wisconsin) a determination of law on a prior appeal establishes the law of the case and puts it beyond the power of the court to overturn such decision on a subsequent appeal of the same case. *Hamel* v. *Danko*, Fla., 82 So.2d 715.

5. On remand, the Circuit Court tried the suits and decided the facts in favor of the property owners. The law had already been decided on the prior appeal.

6. This decree was rendered on February 16, 1955, which was nearly two years before this Court decided *Walker* v. *City of Hutchinson* and *Wisconsin Electric Power Co.* v. *City of Milwaukee*. These decisions were handed down in December, 1956.

7. The first majority opinion affirming the final decree was filed on January 30, 1957, only a few weeks after the Wisconsin Electric Power Co. case.

8. *Walker* v. *City of Hutchinson* was called to the Florida Supreme Court's attention by brief filed on May 28, 1957.

9. This was at or just prior to the oral argument on the City's petition for rehearing which had been granted.

10. In the face of these considerations, the Florida Supreme Court reversed the decrees.

So, the Florida Supreme Court committed two egregious errors. One—it refused to adhere to its own rule with respect to the law of the case and two—it refused to follow this Court's decisions with respect to the validity of service by publication on resident property owners. The Wisconsin Supreme Court at least genuflected in the direction of consistency—it refused to reexamine its prior holding in the Wisconsin Electric Power case on the principle of law of the case from which the inference is warranted that reexamination might have brought reversal. Here the Florida Supreme Court deviated from its own holding and thereby compounded its error.

The due process clause is no abracadabra. It is a forceful and vital statement of principles. Its phraseology has the simplicity of all great writings. The injunction laid upon the States is that they shall not "deprive any person of life, liberty or property without due process of law." In these cases, liens totalling better than One Hundred Thousand Dollars have been imposed on the property of unsuspecting citizens whose efforts to show a lack of corresponding benefits are met with the statement that they had notice and failed to object. But what kind of notice? A small advertisement tucked away among others on the classified advertising page of a large metropolitan newspaper. This, as Justice Jackson observed in the *Mullane* case, when "weighing its sufficiency on the basis of equiva-

lence with actual notice," can hardly be regarded "as more than a feint."

The judgments of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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and

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I, THOMAS H. ANDERSON, one of the attorneys for the appellants herein, and a member of the Bar of the Supreme Court of the United States, certify that on the ... day of February, 1959, I served a copy of the foregoing Appellants' Reply Brief on the City of Miami by mailing a copy in a duly addressed envelope with sufficient postage prepaid to carry the said Reply Brief to MILTON M. FERRELL, Attorney for Appellee, Five Fifty Building, 550 Brickell Avenue, Miami 32, Florida.

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